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Supreme Court, U.S.
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No. 90-480

IN THE

Supreme Court of the United States

October Term, 1990

ROBERT E. NETZLEY,
Petitioner,

v.

JAMES P. CELEBREZZE, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE OHIO SUPREME COURT

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTERSTATEMENT #1 OF THE QUESTION PRESENTED

Petitioner does not lose his right to due process under the 14th Amendment of the U.S. Constitution when a state court overrules Petitioner's Motion for Summary Judgment under Ohio Revised Code 2505.02, since the Petitioner has a right to review and appeal after trial.

COUNTERSTATEMENT #2

There is no absolute immunity from trial for a libel defendant.

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Respondent James Celebrezze respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the decision of the Supreme Court of Ohio in this case. That opinion is reported at 51 Ohio St. 3d 89 (May 16, 1990).

JURISDICTIONAL STATEMENT

Respondents submit that this Court's jurisdiction is improperly invoked under 28 U.S.C. Sec. 1257(a) because the Petitioner has raised no title, right, privilege or immunity set up or claimed under the Constitution, treaties or statutes of or commission held or authority exercised under, the United States.

STATUTES INVOLVED

The Statutes involved here are Ohio Revised Code 2505.02 Final Order (Pet App. A81-82), and Ohio Revised Code 2505.03 which has been reprinted here at page A1. The Ohio Supreme Court ruled in 51 Ohio St. 3d 89 (May 1990), that a denial of a Motion for Summary Judgment in a defamation action does not constitute a final appealable order.

STATEMENT OF THE CASE

A. Summary of Procedural History

This case concerns the defamation of Respondent, James P. Celebrezze, former Associate Justice of the Ohio Supreme Court, based upon a campaign brochure written and published by the Petitioner during the 1984 re-election campaign for the Ohio Supreme Court.

On February 6, 1985, the Respondent, James P. Celebrezze, commenced this libel action against Defendant Robert E. Netzley, (hereinafter "Netzley"), Chairman of the Miami County Republican Committee, the Miami County Republican Committee, (hereinafter "Committee"), who authorized its agent, Netzley, to prepare and publish the campaign brochure containing the defamatory statements and on whose behalf the statements were published; Mary Anne Sharkey, (hereinafter "Sharkey"), Bureau Chief of *The Plain Dealer's* Columbus Bureau, who republished the defamatory statements and Plain Dealer Publishing Company, the owner of *The Plain Dealer,* in which the statements were republished (hereinafter "Plain Dealer").

Motions for Summary Judgment were separately filed by Defendants, Sharkey/Plain Dealer, Netzley, and the Committee. Following extensive briefing by all parties, the trial court rendered its Judgment and Opinion on April 28, 1987, granting the Motions by Sharkey and Plain Dealer, and denying Summary Judgment as to Netzley and the Committee. Notices of Appeal were timely filed by Defendant Netzley on May 26, 1987, by Defendant Committee on May 26, 1987, and by the Plaintiff James P. Celebrezze, on May 27, 1987 in the Eighth District Court of Appeals.

On August 4, 1988 the Court of Appeals issued its Journal Entry and Opinion affirming the trial court's granting of Summary Judgment in favor of the Plain Dealer and Sharkey and also reversed the trial court's overruling of Defendant Netzley and Committee's Motion for Summary Judgment.

Respondent perfected his appeal to the Ohio Supreme Court and on May 16, 1990, the Ohio Supreme Court reversed the judgment of the Eighth District Court of Appeals and remanded the case for trial as to Netzley and the Committee in 51 Ohio St. 3rd 93, holding the Court of Appeals had no jurisdiction to hear the appeal as the overruling of a summary judgment in a libel case is not a final appealable order.

STATEMENT OF THE FACTS

The Respondent, James P. Celebrezze, was elected as an Associate Justice of the Ohio Supreme Court to an unexpired term in November, 1982. He began serving his term on January 11, 1983. In 1984, he ran for re-election to the Supreme Court, was opposed by, and lost the election to Justice Craig Wright, a Republican.

In the same election, Judge Andrew Douglas, a Republican, was opposed by Common Pleas Court Judge John E. Corrigan for the second vacancy on the Supreme Court. Justice Douglas also won this race.

Defendant Netzley is the Chairman of the Executive Committee of the Miami County Republican party and as such his responsibilities and goals were to see that Republicans win elections. As Chairman of the Executive Committee, Netzley's primary duties were to run the campaigns of Republican candidates. This he had been doing for approximately 27 years. He was and is an elected Republican member of the Ohio House of Representatives for twenty-five years.

Prior to the 1984 Elections, Netzley authored the brochure which was published with the authorization and approval of the Committee. The brochure was designed and distributed for the purpose of defeating James P. Celebrezze and John E. Corrigan, both Democrats, in the Ohio Supreme Court race and to promote the election of Andrew Douglas and Craig Wright. Part of the brochure authored by Netzley and approved by the Committee states:

> . . . Ohio's Disgrace
>
> It's no wonder that some are calling Ohio's Justice System the "MAFIA FAMILY" Court. Take a look. Frank Celebrezze, Chief Justice. Brother Jimmy

> Celebrezze, Associate Justice. Cousin Tony Celebrezze, Ohio Attorney General, and Frank Celebrezze's "crony" Angelo Gagliardi, the intimidator in charge of the Ohio Disciplinary Council. (All emphasis in the original.)

Netzley knew before he authored this brochure that no other person or newspaper ever referred to the Ohio Supreme Court members as a "Mafia Family Count." Further, Netzley admitted he had no reason to believe and never did believe that James P. Celebrezze had any connections with the Mafia, the underworld or organized crime. Netzley further admitted that prior to writing the brochure that then Chief Justice Frank Celebrezze had no connections with the Mafia, the underworld or organized crime. Netzley further knew that Anthony Celebrezze and Angelo Gagliardi were never in any way, shape or form, connected with the Mafia, underworld or organized crime.

The brochure included only names of people of Italian heritage and was calculated to associate these Italians with the Mafia. When a judge is running for election and is charged with criminal conduct or with criminal activity that accusation is going to hurt his chances to be re-elected according to Netzley.

Following the election of November 6, 1984 the Plain Dealer ran an article about the Netzley campaign brochure in the November 16, 1984 edition of the Cleveland Plain Dealer. The same story had two *different* headlines. One headline read: *"GOP Boss Firm on Court-Mafia Tie"* and the other *"Netzley Firm on Celebrezze-Mafia Ad."* The Plain Dealer took additional quotes from Netzley where he stated: "I'm not apologizing to that court, I tell you. That's the way we feel about the court and the whole system . . . a lot of people in Miami County feel that way."

Two days after the articles of November 16, 1984, *The Plain Dealer* on November 18, 1984 published an editorial statement entitled "*Netzley Owes an Apology.*" The *Plain Dealer* editorial characterizes Netzley as "outrageous" and "a loose cannon [who], . . . crossed the line of fair play with his licentious, even libelous, smear based solely on ethnic heritage." The Plain Dealer pointed out that "By offering no proof of Mafia ties other than Italian ancestry Netzley scurrilously smeared an entire nationality group as well as the individuals named." The Plain Dealer responded to Netzley's claim that he had used the word "Mafia" in the political sense by stating:

> "*Rubbish.* In both context and timing, there was *never any doubt about how the words were used.* By his choice of unqualified pejoratives *Netzley* clearly *tried to damage James Celebrezze's candidacy* in terms that go beyond the bounds of fair play and tough politicking. Such gutter stuff must not be tolerated." (Emphasis added) (See "App. 5", May 8, 1985).

REASONS FOR DENYING THE WRIT

1

Petitioner failed to raise or preserve the purported constitutional issue of constitutional immunity in the trial court that overruled Petitioner's Motion for Summary Judgment. Further, this constitutional issue was not raised in the Court of Appeals and only surfaced in Petitioner's Appeal to the Ohio Supreme Court.

2

A denial of a summary judgment in a defamation action does not constitute a final appealable order under Ohio law. The decision of the Ohio Supreme Court in this case does not require a review since it merely reflects the proper application of well-settled principles of Ohio law.

Ohio R.C. 2505.02 Final Order provides, in pertinent part: "An order that affects a substantial right in an action which in effect determines the action and prevents a judgment, an order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment, or an order that vacates or sets aside a judgment or grants a new trial is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial."

An order, to be final, must fit into at least one of the three categories set forth in R.C. 2505.02. *General Electric Supply Co. v. Warden Electric, Inc.* (1988), 38

Ohio St. 3d 378, 528 N.E.2d 195. The denial of a Motion for Summary Judgment does not determine the action and prevent a judgment and generally does not constitute a final order under O.R.C. 2505.02. *Nayman v. Kilbane* (1982), 1 Ohio St. 3d 269.

There is a difference in the concept of immunity from suit rather than the defense to liability. *See Nixon v. Fitzgerald* (1982), 457 U.S. 731 which case concerned absolute Presidential immunity.

In the case before this Court, the Petitioner seeks to avoid a trial under the reasoning expressed in the *Nixon* case.

The final judgment rule applies to a very narrow circumstance in which the right to review would be irretrievably lost, absent an immediate appeal. *See Richardson-Merrell, Inc. v. Koller,* 472 U.S. 424 (1985).

There is no special immunity such as Presidential immunity, which should extend to this Petitioner herein.

The right to be free from liability for expressions of opinion can certainly be preserved upon appeal. It may not be made a special proceeding pursuant to Ohio Revised Code 2505.03.

The Petitioner herein has not presented an important legal issue to this Court for review, but simply seeks to establish an immunity from suit in a defamation case.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

OHIO REVISED CODE

§2505.03 Final order may be appealed; exception.

(A) Every final order, judgment, or decree of a court and, when provided by law, the final order of any administrative officer, agency, board, department, tribunal, commission, or other instrumentality may be reviewed on appeal by a court of common pleas, a court of appeals, or the supreme court, whichever has jurisdiction.

(B) Unless, in the case of an administrative-related appeal, Chapter 119, or other sections of the Revised Code apply, such an appeal is governed by this chapter and, to the extent this chapter does not contain a relevant provision, the Rules of Appellate Procedure. When an administrative-related appeal is so governed, if it is necessary in applying the Rules of Appellate Procedure to such an appeal, the administrative officer, agency, board, department, tribunal, commission, or other instrumentality shall be treated as if it were a trial court whose final order, judgment, or decree is the subject of an appeal to a court of appeals or as if it were a clerk of such a trial court.

(C) An appeal of a final order, judgment, or decree of a court shall be governed by the Rules of Appellate Procedure or by the Rules of Practice of the Supreme Court, whichever are applicable, and, to the extent not in conflict with those rules, this chapter.